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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA,
Appellant,

vs.

COTTON VALLEY OPERATORS COMMITTEE, ET AL.,
Appellees.

MOTION ON BEHALF OF WM. DWIGHT WHITNEY FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND FOR FURTHER RELIEF.

WM. DWIGHT WHITNEY,
Counsel.

April 17, 1950



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MOTION ON BEHALF OF WM. DWIGHT WHITNEY FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND FOR FURTHER RELIEF.

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes WM. DWIGHT WHITNEY and respectfully moves this Court, pursuant to Rule 27 paragraph 9 of the Rules of this Court, for leave (1) to file a brief in this case *amicus curiae,* and (2) in the event of an order for reargument, for leave to participate in the oral argument as *amicus curiae.*

The ground for the application is that the issues are of fundamental constitutional importance, involving the relations between the executive branch of the government, the judicial branch of the government and private parties who are engaged in litigation against the government in civil proceedings in the United States courts.

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The briefs filed in the case on behalf of the various appellees leave the constitutional history open for further development. For example, no reference is made in the briefs for the appellees to the fact that in the other nation sharing our common law traditions—England—the subject has recently been reviewed by Parliament and has resulted in a statutory determination that only in the most extreme case (specifically that in which the Minister in question personally directs his attention to the particular document) shall the executive withhold any document from discovery by a private party in litigation to which the Government is a party. Crown Practices Act, 1947, § 27,[1] when read with the earlier decision in *Duncan* v. *Cammell Laird & Co.* [1942] A. C. 624.

As the government's brief in this case very fairly points out, the *Duncan* case in the House of Lords was, in view of its importance, considered by a court of seven Law Lords (the normal quorum of that court being five). But the gov-

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[1]The Act in its principal portion provides:

"DISCOVERY.—(1) Subject to and in accordance with rules of court and county court rules:—

"(a) in any civil proceedings in the High Court or a county court to which the Crown is a party, the Crown may be required by the court to make discovery of documents and produce documents for inspection; and

"(b) in any such proceedings as aforesaid, the Crown may be required by the court to answer interrogatories:

"Provided that this section shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest."

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ernment's brief does not go on to explain the significance of the fact that, although that case was argued at a time when bombs were falling on London, the court, after a most extensive consideration, nonetheless reached the conclusion that there were very narrow limits to the power of the executive to withhold documents from discovery even on grounds of national security.

This Court must undoubtedly be especially reluctant that our country should through any inadvertence either (a) fall behind Great Britain in the protection of the freedom of the citizen from the risk of use of arbitrary power, or (b) approach in its jurisprudence those other nations in which the rule is followed that there is some special quality inherent in the sovereign which entitles it to a special "privilege" to withhold documents from the normal procedure of discovery.

I do not for one moment suggest that the Attorney General, in contending at the bar of this Court for just that *privilege*, has any intention whatsoever to exercise a comparable arbitrary power. But the uses to which the power, once recognized by this Court, may be put, are at least enough (I submit) to require the most earnest and prayerful consideration, as a result of the most thorough research, before such a power be established as the law of our country.[2]

That further research into our own constitutional history is also warranted, is indicated by the brief consideration given in the appellees' briefs to the trial of Aaron Burr, and to other early cases in our history.

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[2]*Duncan* v. *Cammell Laird & Co.* was orally argued before the House of Lords for three days in March 1942. [1942] A.C. at 624.

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Yet the question is one also of current practical significance. In one equity case pending in the Southern District of New York, *United States* v. *Morgan, et al.*, Civil Action No. 43-757, in which your petitioner is interested as counsel for two of the groups of defendants, the government counsel stated within the last month in open court that the Attorney General's office had collected between 100,000 and 200,000 documents, but (unlike the other government counsel in the present case in the Western District of Louisiana) refused to make even a limited disclosure of them, claiming an absolute privilege. There is thus an inconsistent practice on the part of the various representatives of the Attorney General.

Prima facie there is no ground for the withholding of any document. There is no reference in the Federal Rules of Civil Procedure to the government as being in a position in any way different from any other party in a civil action conducted by those rules.

All must no doubt appreciate, however, that even rules of court may occasionally have to bow to considerations of national security. But that they should bow to an assertion of executive "privilege"—a privilege which may, so runs the argument of the government in the present case, be asserted by any of the numerous branches of our government, civilian as well as military— savors of an age from which Chief Justice Marshall thought that we had already emerged in his time, and of judicial practices in a part of the world from which even socialist Britain has been at pains to keep itself free.

* * * * *

I frankly recognize and apologize for the fact that this application comes at a very late date. The reason is that

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the briefs for appellees were only filed in this Court this week. When this Court noted probable jurisdiction in January, I applied at once to the Solicitor General for leave by letter dated January 20 reading as follows:

> "I would be grateful if I might have your consent to my submitting a brief as *amicus curiae* before the Supreme Court in the above case.
>
> "I have discussed the case with various other members of the Supreme Court bar in New York who are interested in the question presented and who have expressed themselves as hopeful that you may afford to me an opportunity to present the views which are held by many of us who have been active in work of this character, but which conflict with the views expressed by the Government.
>
> "As I have not had the privilege of meeting you personally, and my name may not be known to you, I presume to introduce myself as having appeared on behalf of the United States as Assistant Attorney-General in the Anti-Trust Division among others, in the *Trenton Potteries* and *Sisal Sale* cases, and on behalf of defendants, among others, in the *United States Alkali Association, De Beers* and *National Lead* cases."

This application was refused by the Solicitor General under date of January 24. I thereupon supplied material to the principal counsel for the appellants, but was not informed as to the extent of its use prior to receiving his brief this week.

Respectfully submitted,

WM. DWIGHT WHITNEY,
Counsel.

April 17, 1950.

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